Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

BELLSOUTH CORPORATION

M. Robert Sutherland
Rebecca M. Lough
Theodore R. Kingsley

Its Attorneys

Suite 1700
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610

(404) 249-3392

DATE: October 21, 1996

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

BellSouth Corporation, on behalf of its affiliated companies ("BellSouth"), respectfully files its Petition for Clarification and Reconsideration of the Commission's Report and Order in this proceeding.[1]

INTRODUCTION AND SUMMARY

BellSouth commends the Commission and its staff on its estimable effort to implement a landmark Congressional mandate to undertake comprehensive regulatory reform of the payphone services market in a matter of months. Especially gratifying is the Commission's statement of belief that "full and unfettered competition is the best way of achieving Congress' dual objectives to promote 'competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.'"[2] Equally important is the

[1] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, FCC 96-388, CC Docket No. 96-128, Report and Order, (Sep. 20, 1996), amended, Errata, DA 96-1623 (Sep. 27, 1996), Further Errata, DA 96-1666 (Oct. 8, 1996).

[2] Report and Order at ¶ 55.

Commission's recognition that "Section 276 . . .significantly alters the regulatory landscape by requiring that LEC provision of payphone service be on par with independent PSP provision of service."[3]

The Report and Order is obviously animated by the Commission's sincere desire to remove state and federal regulatory impediments to competition,[4] to allow competitive markets to set prices,[5] to allocate costs rationally to those who benefit from services provided,[6] and to recognize that states are in the best position to address matters of local concern.[7] BellSouth's petition is designed to bring to the Commission's attention matters that ought to be clarified or reconsidered so as to facilitate development of competition by removing the fetters of unnecessary, extralegal, and, perhaps, unintended regulatory impediments that may be found within the four corners of the Report and Order.

BellSouth requests that the Commission clarify that eligibility for interim per call compensation is not tied to Commission approval of a LEC CEI plan, and that such eligibility extends to 0+ calls from all BOC payphones during Phase I. Such clarification will encourage, and, perhaps more importantly, not discourage, LECs from undertaking the rapid removal of payphone subsidies. BellSouth, as a member of the RBOC Payphone Coalition, has also requested in a separate petition that the Commission make clear that LECs are permitted to eliminate subsidies and reallocate or reclassify payphone assets at any time prior to April 15,

[3] Id. at ¶ 58.

[4] Id. at ¶¶ 49, 58, 225-243.

[5] Id. at ¶ 56.

[6] Id. at ¶ 83.

[7] Id. at ¶ 280.

1997, and that LEC eligibility for interim compensation begins as soon as subsidies are terminated and assets are reclassified.

Second, BellSouth requests that the Commission reconsider its requirement that incumbent LECs file local exchange payphone lines in their federal interstate access tariffs. Payphone lines are local exchange services for which state tariffs exist. Moreover, the interstate costs of such lines are already recovered through the multiline business subscriber line charge and carrier common line charges. While access tariff revisions have been a requirement of the CEI plans that are required under the panoply of non-structural safeguards enumerated in the course of the Computer III proceedings, this has been because interstate access services have been involved. In contrast, where only local exchange services are involved, there is neither authority for a federal tariffing requirement under the Communications Act nor is there a practical need for such a requirement in order to deter anticompetitive behavior.

Third, BellSouth supports the RBOC Payphone Coalition's request that the Commission clarify that the Commission does not intend to depart from its established accounting rules which specify that the only "intangibles" that must be included in the market valuations of transferred assets are those that appear on the RBOC's books. In its individual petition, BellSouth requests that the Commission reconsider and withdraw its conclusion concerning going concern valuation of intangible assets not carried on RBOC books in the context of a LEC's subsequent transfer of reclassified assets to a separate, unregulated subsidiary. If the Commission's going concern conclusion was intended to announce a change in the agency's accounting rules, any such change is in derogation of the requirements of the Administrative Procedures Act.

Finally, BellSouth is gratified that the Commission concluded that the record does not support a finding that it would be contrary to the public interest to allow BOCs to negotiate with location providers with respect to selecting and contracting for the interLATA carriers presubscribed to their payphones. BellSouth seeks reconsideration of certain language used paragraph 244 of the Report and Order. Specifically, BellSouth requests that the Commission reconsider its use of the conjunctive/disjunctive "and/or" and clarify the scope of branding opportunities available to BOCs in light of the 1996 Act, the Report and Order, and TOCSIA.

I. THE COMMISSION SHOULD CLARIFY THAT A BOC PSP's ELIGIBILITY TO RECEIVE PER CALL COMPENSATION IMMEDIATELY IS CONDITIONED ONLY ON ELIMINATION OF SUBSIDIES AND RECLASSIFICATION OF PAYPHONE ASSETS. [¶¶ 53, 125, 172, 183, 239, 369]

BellSouth believes that Congress intended that the regulatory reforms outlined in Section 276 be implemented as soon as practicable. To this end, BOC PSPs should be eligible to receive interim per call compensation as soon as their reclassification of payphone equipment, along with the termination of payphone subsidies, is complete. For the reasons set forth in the Petition for Clarification filed in this proceeding by the RBOC Payphone Coalition, BellSouth requests that the Commission clarify that its Report and Order was not intended to discourage LECs from filing revised federal carrier common line ("CCL") tariffs and cost allocation manuals ("CAM") as soon as possible, and to have tariffs reflecting revised intrastate rates in place at the earliest practicable moment. Further, the Commission should clarify that the relevant dates established in its Report and Order were not intended to lengthen existing timing rules relating to CCL tariff and CAM review.

BellSouth requests that the Commission further clarify that, once a BOC PSP has satisfied its eligibility requirement for interim per call compensation by reclassifying payphone equipment

and terminating subsidies, it shall be eligible to receive such compensation notwithstanding the status of any CEI plan filed by the BOC. The Commission explicitly established that Commission approval of the CEI plan is a prerequisite to BOC participation in interLATA presubscription for their payphones,[8] but did not (and should not) establish CEI plan approval as a prerequisite for receiving interim compensation. CEI plans are subject to a different timing and review process, and to link the CEI plan with the CCL tariff filings, CAM filings, and intrastate tariff revisions would unnecessarily impede a rapid transition to a fully competitive payphone market place.

Finally, the 1996 Act specifically requires the Commission to establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.[9] The Commission concluded that BOCs must receive fair compensation for 0+ calls completed on BOC payphones, and that BOCs may receive per-call compensation established by the Report and Order as soon as they reclassify their payphones and terminate all subsidies, provided they do not otherwise receive compensation for use of their payphones in originating 0+ calls.[10] Such compensation will be made on a per call basis.

The Commission has adopted a two phased approach to ensuring fair compensation for all calls. During the first year that the Report and Order is in effect, IXCs will pay compensation for access code calls and subscriber 800 calls on a flat-rate basis.[11] In the year following the

---

[8] Id. at ¶ 239 (A BOC will not be allowed to engage in the conduct authorized by Section 276(b)(1)(D) until it has submitted and received approval of an initial CEI plan filed pursuant to Section 276(b)(1)(C)).

[9] 1996 Act, §276(b)(1)(A), reprinted at Report and Order at App. A, p. 173.

[10] Report and Order at ¶ 53.

[11] Id. at ¶ 50.

anniversary of the Report and Order, per-call tracking capabilities for access code calls and subscriber 800 calls will be in place, and true "per call" (as opposed to flat rate) compensation will be in effect.[12] Per call tracking capabilities are already in place however, for intrastate and interstate 0+ calls made from BOC payphones. Therefore, the Commission should clarify that, in addition to the interim (flat rate) per call compensation for access code and subscriber 800 calls which BOCs will be eligible for upon reclassification of assets and termination of subsidies during the first phase of per call compensation, BOCs will also be eligible for interim per call compensation at the rate of $.35 per call for all 0+ calls originating from all BOC payphones so long as BOCs do not otherwise receive compensation for the use of their payphones in originating 0+ traffic.[13] During the second phase of per call compensation, BOC LECs will be eligible for continuing per call compensation on otherwise uncompensated 0+ calls pursuant to per call tracking mechanisms currently in place, as well as per call compensation on access code and subscriber 800 calls pursuant to per call tracking mechanisms that are required to be put in place by the Report and Order.[14]

II. THE COMMISSION SHOULD RECONSIDER ITS REQUIREMENT THAT LECS MUST TARIFF COIN TRANSMISSION SERVICES IN THEIR INTERSTATE ACCESS TARIFFS. [¶¶ 146, 147]

In the Report and Order, the Commission required local exchange carriers ("LECs") to file payphone exchange lines in their interstate access tariffs as new services under the Commission's

[12] Id. at ¶ 51.

[13] Id. at ¶ 53. The $.35 rate is established at ¶ 72.

[14] Id. at ¶ 99.

Price Cap rules.[15] BellSouth respectfully requests the Commission to reconsider this determination. The services at issue are local exchange services, and the Commission is not authorized to require them to be filed in interstate access tariffs.

A. Payphone Service Providers Are End Users.

Prior to this rulemaking proceeding, the Commission had already determined that independent payphone providers[16] are "end users" upon whom subscriber line charges ("SLC's")[17] must be assessed.[18] This determination stemmed from the overall access charge scheme adopted by the Commission in its original access charge proceeding,[19] as well as the specific provisions in

[15] Id. at ¶¶ 146-147. Interestingly, the requirements to file these tariffs is not included in the ordering clauses of the Report and Order, nor is there a date set by which such filings must be made.

[16] The term "independent payphone providers" is used to refer to non-LEC providers of payphone service.

[17] The terms "subscriber line charges" and "end user common line" charges ("EUCL" charges), are used interchangeably herein to refer to the charges established in Section 69.104 of the Commission's rules.

[18] C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc., 10 FCC 9775 (1995), petition for review pending sub nom C.F. Communications Corp. v. FCC and United States, No. 96-1563 (D.C. Cir. filed Nov. 6, 1995). See also Section 69.104(a) of the Commission's rules, 47 C.F.R. § 69.104(a).

[19] For interstate interLATA calls over the public switched network, the Commission's access charge scheme and rules required (1) SLC's to be assessed to end users to recover a portion of the interstate costs of the local exchange lines used to originate and terminate such calls; and (2) interstate access charges (including carrier common line charges, also known as "CCL charges") to interexchange carriers ("IXCs") to recover the costs of the interstate access services provided to such IXCs for the origination and termination of interstate interLATA calls to such end users. Third Report and Order, MTS and WATS Market Structure, CC Docket No. 78-72, 93 FCC 2d 241 (1983), modified on recon., 97 FCC 2d 682 (1983) (hereinafter First Reconsideration Order), modified on further recon., 97 FCC 2d 834 (1983), aff'd and remanded in part sub nom. National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 101 FCC 2d 1222 (1985), further recon., 102 FCC 2d 849 (1985).

the Commission's rules which define "end user"[20] and "public telephone"[21] and which require the application of SLC's to end users (including subscribers of semi-public coin telephone service) to compensate, in part, for the interstate use they make of the exchange line[22] which is provided to each as a part of the local exchange service it obtains from a LEC.[23] Exhibit A, which is attached hereto, provides a schematic illustration of this arrangement.

The Report and Order alters neither the status of independent payphone providers as end users nor the requirement that EUCL charges be assessed by LECs to such providers for the interstate use made of the common lines which such providers obtain as a part of their local exchange service. The Report and Order has continued to recognize that the services obtained by payphone providers from LECs for connection to the public switched network are local exchange services, that the lines obtained by payphone providers are subscriber lines, and that SLC's should be applied for the recovery of the interstate use of such lines.[24] Rather, the Report and Order

---

[20] 47 C.F.R. § 69.2(m).

[21] 47 C.F.R. § 69.2(ee).

[22] Such lines are referred to herein interchangeably as "exchange lines," "common lines" and "subscriber lines" and at all times refer to the exchange line connecting an end user (including a payphone provider) and "a Class 5 office that is or may be used for local exchange service transmissions" within the meaning of Section 69.104(a) of the Commission's rules, 47 C.F.R. § 69.104(a).

[23] 47 C.F.R. § 69.104(a). As the Commission notes in the Report and Order, ¶ 180, the remainder of the costs of the common lines associated with the use by independent payphone providers of their local exchange services for interstate calling is collected in CCL charges assessed to interexchange carriers in connection with access services provided to them.

[24] See Report and Order ¶¶ 11, 180, 187; Notice of Proposed Rulemaking, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, , 11 FCC Rcd 6716 (1996) ("NPRM"), ¶¶ 53-54.

revises the treatment of LEC payphone providers to mirror the status of independent payphone providers.[25]

B. The Interstate Costs of Subscriber Lines Used By PSPs Are Recovered Through Subscriber Line Charges and Carrier Common Line Charges.

Historically, the Commission's rules did not provide for the assessment of SLC's upon LECs which provide "public telephones" due to the fact that the entire interstate cost of the "public telephone" service, including LEC's telephone sets as well as the local exchange lines, was recovered through interstate carrier common line charges.[26] The Report and Order requires incumbent LECs to make an exogenous change under Price Cap rules to remove from CCL charges the costs of the now-deregulated payphone CPE and to assess SLC's on the subscriber lines provided to incumbent's LECs' for their payphone services.[27] Thus, CCL charges will no longer be used to recover the costs of any payphone CPE. The interstate costs of the subscriber lines utilized by all payphone providers (incumbent LEC and independent providers alike) will be recovered in part by SLC's assessed by the incumbent LEC to all such payphone providers (incumbent LEC and independent providers alike) and in part by interstate CCL charges assessed by the incumbent LEC to interexchange carriers (or other access customers) in connection with the interstate switched access services provided to them.

The Commission imposed numerous requirements in conjunction with its determination to deregulate LEC-provided payphone CPE, with the overall design and purpose of meeting the

[25] See, e.g., Report and Order at ¶ 187.

[26] Id. at ¶ 180 and 183; NPRM at ¶ 53.

[27] Report and Order at ¶¶ 180-187, 370. LECs are also required to remove any payphone CPE costs from any intrastate charges. Id. at ¶ 186.

requirements of Section 276.[28] One of these requirements mandates that incumbent LECs must unbundle "coin transmission services," both the service provided for "smart payphones" and the service provided for "dumb payphones,"[29] from the deregulated payphone CPE, under "nondiscriminatory, public, tariffed offerings."[30] BellSouth does not object to this requirement as long as local exchange services, in general, are subject to a state tariffing requirement.[31] What BellSouth does take issue with, and requests reconsideration of, is the Commission's refusal to permit LECs to rely upon tariffed offerings in their local exchange tariffs filed with state regulatory commissions for such "nondiscriminatory, public, tariffed offerings" and the Commission's requirement that LECs make such services available through their interstate access tariffs as a part of LEC's access services pursuant to the Commission's Price Cap rules.[32]

As indicated above, the coin transmission services which the Commission is requiring LECs to tariff in their interstate access tariffs are local exchange services. The exchange lines which connect payphone CPE to their dial tone switch provide the basic connection by which calls can be made from payphones through the public switched network, whether local, intraLATA, intrastate interLATA, or interstate interLATA. As such, they are common lines, also known as subscriber lines, and the Commission's rules already specify the interstate charges which are to be

---

[28] See Id. at ¶ 1-8.

[29] A "smart payphone" (also known as an "instrument implemented telephone") is one which does not rely on central office coin signaling and a "dumb payphone" (also known as a "central-office implemented telephone") is one which does rely on central office coin signaling. See Id. at ¶¶ 146 and 367 and Appendix E.

[30] Id. at ¶ 146.

[31] Of course, if in the future a state determined to detariff or deregulate local exchange services, the same rules should apply to payphone lines.

[32] Id. at ¶ 146-147.

assessed to recover for the interstate use of such lines -- SLC's to the end user payphone provider and CCL charges to interexchange carriers in connection with the interstate access service provided.[33] As the Commission states in the Report and Order,

> ...[P]ayphones, as well as all other telephones, are connected to the local switch by means of a subscriber line. The costs of the subscriber line that are allocated to the interstate jurisdiction are recovered through two separate charges: a flat-rate SLC assessed upon the end-user customer who subscribes to local services; and a per-minute CCL charge assessed upon IXCs that recovers the balance of the interstate subscriber line costs not recovered through the SLC.[34]

The Commission's rules provide for no additional rate elements or charges to be applied for the interstate use of such lines, and the Commission, in the NPRM and the Report and Order, neither provided notice that it was intending to revise its Part 69 rules to establish a new rate element nor did it, in fact, establish such a new rate element. Indeed, given that the full interstate costs of such lines is already recovered through the combination of SLC's and CCL charges, no additional interstate charges are needed or appropriate.

C. The Commission Lacks Jurisdiction To Requiring Tariffing of Exchange Services in Interstate Tariffs.

Moreover, the Commission has no authority to require the tariffing of exchange services in interstate tariffs. Prior to the Telecommunications Act of 1996, the exclusive authority to regulate intrastate telecommunications services, including local exchange services, was reserved to the states.[35] Although Section 276 requires the Commission to prescribe regulations as delineated in Section 276(b) of the Act and permits the Commission to preempt "state requirements" in certain instances, this preemption authority only extends to those instances in

[33] 47 C.F.R. §§ 69.104(a) and 69.105.

[34] Report and Order at ¶ 180.

[35] 47 U.S.C. §§ 152(b), 221(b).

which such state requirements "are inconsistent with the Commission's regulations."[36] The Commission in the Report and Order did not state what "state requirements" it deemed to be inconsistent with the Section 276(b) requirements the Commission established, nor did it (or could it) find in advance that any and all requirements a state would promulgate in response to the Report and Order would be inconsistent with such requirements of the Commission.

Indeed, BellSouth already has filed the coin transmission services at issue in its local exchange service tariffs of all the nine states in its operating territory. One line is for "smart payphones" and the other line is for "dumb payphones."[37] Such lines are made available to all payphone providers on a nondiscriminatory basis, and thus independent payphone providers may obtain the exchange services for "dumb payphones" which the Commission was concerned have not been available to them.[38] There is no showing that any of BellSouth's nine states have imposed or plan to impose requirements inconsistent with the Commission's nondiscriminatory safeguards as established in the Report and Order with regard to these services, and, thus, there is no basis for a preemption.

Moreover, BellSouth submits that the preemption authorized by Section 276(c) applies only to those requirements imposed by states which are inconsistent with the Commission's requirements imposed under Section 276(b), none of which requires federal tariffing of local exchange services. Section 276(c) does not authorize the Commission to take wholesale

---

[36] 47 C.F.R. § 276(c).

[37] The exchange service for "smart payphones" is already effective in all nine states. The exchange service for "dumb payphones" is already effective in Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina and South Carolina and is scheduled to take effect in Louisiana and Tennessee within the next 30 days.

[38] Report and Order at ¶ 146.

jurisdiction over such local exchange services as the Commission nevertheless has attempted to do through its interstate access tariffing requirement.

D. A Federal Tariffing Requirement Is Not Necessary To Assure Protection From Discrimination.

The Commission's attempted preemption by means of the federal tariffing requirement is neither rational nor is it necessary in order to achieve Section 276(b) requirements. The requirement to file local exchange services in LECs' interstate access tariffs under the Commission's Price Cap rules is contrary to the Commission's existing separations and access charge schemes.[39] Perhaps even more importantly, the Commission's general scheme for assuring that the purposes of Section 276 are met can remain in full force and effect (except as otherwise challenged in other portions of this Petition for Reconsideration) even if the local exchange lines at issue here are not filed in LECs' interstate access tariffs. Indeed, a federal tariffing requirement is not necessary in order to assure such other requirements are met. LECs can still be required to unbundle payphone CPE from regulated coin transmission services.[40] Such CPE will still be required to be treated as detariffed and deregulated.[41] CPE costs will still be required to be removed from both interstate and intrastate charges.[42] BOCs will continue to be required to file

[39] Such requirement appears to be wholly arbitrary and capricious. Not only is there no showing that the states will impose requirements inconsistent with the Commission's, but the services at issue are not access services; there is no basis for requiring the intrastate costs and charges of such services to be included as a part of the Commission's interstate access charge and Price Cap regime. The full interstate costs of such services are already recovered through SLC and CCL charges. Additionally, there are no Part 69 rate elements for such services (aside from SLC and CCL charges), and there is no Part 61 Price Cap basket for such services (aside from SLC and CCL charges).

[40] Report and Order at ¶¶ 146-148.

[41] Id. at ¶¶ 142-145.

[42] Id. at ¶¶ 180-187.

CEI Plans and to provide for nondiscriminatory access to network features and functionalities.[43] The Commission's CPNI restrictions will continue to apply as will its network information disclosure rules and its requirements for nondiscriminatory provisioning, installation and maintenance of such services and nondiscriminatory reporting requirements.[44] The Commission's cost accounting safeguards will still apply, as well as its Part 64 cost allocation and Part 32 affiliate transaction rules, and the Commission can still require adherence to its requirements for the reclassification and transfer of, and specified accounting for, certain assets, as specified in the Report and Order.[45] Finally, the Commission's determinations regarding the registration of such CPE and location of the point of demarcation will still apply.[46]

Although the Commission appears to be requiring the federal tariffing of local exchange services, it is possible that it instead intends that LECs not file exchange services for payphones in their interstate tariffs, but rather new interstate access services which have the functionality of exchange services for payphones in their interstate tariffs. Nevertheless, there is still no basis for requiring such filings. As discussed above, the Commission's access charge scheme provides for the establishment of specific interstate switched access services which are enumerated in Part 69 of the Commission's rules. Interstate access services are for the purpose of originating and terminating interstate, interLATA calls by an entity, usually a carrier, which carries the call out of the LATA to another LATA or which delivers a call from another LATA into the present LATA.[47] Indeed, although LEC's presently have a switched access service, Feature Group A,

---

[43] Id. at ¶¶ 202-207.

[44] Id.

[45] Id. at ¶¶ 152-172.

[46] Id. at ¶¶ 150-151.

[47] See supra n. 19 and accompanying text and Exhibit A.

which provides for a line-side connection into a dial tone switch, in much the same functional manner as a local exchange service, such service is not available for local exchange service. Rather, a customer seeking to obtain Feature Group A service must establish to the LEC the manner in which it will carry calls out of the LATA which it has collected from end users in the LATA over its Feature Group A service and the manner in which its will obtain calls from other LATAs for distribution to end users in the instant LATA over its Feature Group A service.[48] Exhibit B, which is attached hereto, provides a schematic illustration of a Feature Group A switched access service arrangement.

Although the Commission's ONA proceedings required LECs to file unbundled ONA elements in their interstate tariffs, these services were not for use as local exchange services, but rather were to be made available for legitimate interstate access services, i.e. when the ESP was collecting traffic from its end user customers in the LATA for further transport to another LATA, or was delivering traffic from another LATA into the instant LATA for termination to its end users in the instant LATA.[49] Exhibit C, which is attached hereto, illustrates this arrangement. Access charges would normally apply to the ESP for such arrangements, but for the Commission's specialized exemption of ESPs from access charges. This exemption permits, but does not require, ESPs to pay local exchange service charges in lieu of access charges, thus

[48] See BellSouth's Tariff F.C.C. No. 1, Sections 6.1, 6.1.1(A) and 6.2.

[49] A good illustration of an interstate, interLATA enhanced service arrangement can be found in Memorandum Opinion and Order, Northwestern Bell Telephone Company, 2 FCC Rcd 5986 (1987). See also First Reconsideration Order, ¶¶ 76-88; Order, Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988) ¶ 2 (exemption applies to ESPs who provide interstate services); Memorandum Opinion and Order on Reconsideration, Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084 (1990) at ¶ 44 and n. 102 and 103 (describing interstate ONA services as services for ESPs' interstate interLATA traffic); Memorandum Opinion and Order, Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) ¶ 274 and n. 617.

providing the ESP the option of paying either local exchange service charges or interstate access charges for the access arrangement provided.[50] In contrast, the Commission has definitively noted that payphone providers are end users in the first instance.[51] The payphone provider is not using the exchange line obtained from the LEC to collect traffic originated from other end user local exchange services in the LATA for delivery out of the LATA, nor is it using its exchange line for the purpose of distributing traffic from outside the LATA to other end user's local exchange services in the LATA. Rather, a payphone provider is the end user which is originating (or receiving) a call in the first instance, be it local, intraLATA, intrastate interLATA, or interstate interLATA. In any event, if payphone providers were in need of a line over which to collect and distribute interLATA calls from and to other end user local exchange providers, the applicable interstate tariff offering is already in place as Feature Group A switched access service, and no new service is required to be made available.[52]

It follows that it misses the point entirely to claim that in order to meet CI-III requirements, as required by the Telecommunications Act of 1996, the Commission must require

---

[50] First Reconsideration Order, ¶¶ 76 - 88; Order, Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC 2631 (1988) (continues ESP exemption from the requirement to pay access charges); Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991) ¶¶ 60-65 (continues ESP exemption from the requirement to pay access charges).

[51] See n. 18 and 24 supra.

[52] In any event, even if the Commission were to determine that the necessary interstate access service is not available in the interstate access tariff, it should defer any interstate access tariffing requirement until legitimate requests for such capabilities for use as interstate access services are received. Cf. Order, Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, 11 FCC Rcd. 6919 (1996) at ¶ 33 (Bell Atlantic not required to make federal tariff filing of an interstate access ISDN capabilities until a request was made therefor).

coin transmission services to be filed in the interstate access tariffs. Even under CI-III, all of the Commission's non-structural safeguards could still have been met without any federal access tariffing requirements if no interstate access services had been involved. Indeed, the safeguards imposed in the Report and Order are essentially identical to the requirements imposed through the Commission's CPE detariffing and unbundling requirements of Computer II[53] and the Commission's subsequent elimination of the CPE separate subsidiary requirement in the BOC CPE Safeguards[54] proceeding. A federal tariffing requirement was not necessary in order to achieve a workable set of safeguards in such proceedings.

Moreover, prior to its ONA/Part 69[55] proceeding, the Commission recognized that federal tariffs were not an absolute prerequisite to safeguards for BOCs' integrated enhanced service offerings. Indeed, the Commission expressly permitted BOCs to implement their CEI plans by filing CEI/ONA service tariffs only at the state level.[56] Although the Commission did go on subsequently to impose a federal tariffing requirement in its ONA proceedings, it did so in recognition that the nature of many ESPs' use of the network is much like that of IXCs -- not because it deemed federal tariffs to be the sine qua non of effective safeguards. ESPs were collecting and distributing interstate, interLATA traffic from and to end users and were legitimate

---

[53] Final Decision, Second Computer Inquiry, 77 FCC 2d 384 (1980) (subsequent history omitted).

[54] Report and Order, Furnishing of Customer Premises Equipment by the Bell Operating Telephone companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987) (subsequent history omitted).

[55] Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991) (subsequent history omitted).

[56] See, e.g., Memorandum Opinion and Order, BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7291 (1988).

interstate access customers (although permitted, by the exemption discussed above to take local exchange services in lieu thereof).[57] Even then, however, the Commission recognized that the local exchange services provided to end user customers of ESPs, including features and functionalities of the local switch, should not be federally tariffed and need not be federally tariffed in order to assure compliance with non-structural safeguards.[58]

Finally, the Act's requirement that the Commission establish safeguards in connection with the deregulation of payphone CPE which are "equal to" those adopted in CI-III does not mandate that each and every aspect of the Commission's regulations be exactly the same, or that the Commission create an interstate access service where there is none just because there was, in fact, an interstate access service in the case of ESPs in the ONA proceeding. As fully explained above, the services provided to payphone providers are not interstate access services. There has been no finding that payphone providers are using payphones to collect calls from the local exchange services of end user local exchange service subscribers in the same LATA for transport to another state and LATA or to distribute calls from outside of the state and LATA to local exchange services of other end users in the state and LATA. Indeed, every determination of the Commission thus far has been that payphone providers are themselves end users in the first instance. In sum, given that all of the Commission's non-structural safeguards can be met without requiring the local exchange services provided to such end user payphone providers to be filed in interstate tariffs and given that there are no inconsistent state requirements which would permit a

[57] See supra n. 49 and 50 and accompanying text.

[58] See, e.g., Memorandum Opinion and Order and Order on Reconsideration, Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084 (1990) at ¶ 49.

preemption in this regard, the Commission must reconsider and reverse the federal tariffing requirement.

III. THE COMMISSION SHOULD RECONSIDER ITS DETERMINATION THAT ANY EVALUATION OF "FAIR MARKET VALUE" MUST TAKE INTO CONSIDERATION THE "GOING CONCERN VALUE" OF LOCATION CONTRACTS AND OTHER INTANGIBLES. [¶ 164]

BellSouth concurs with the RBOC Payphone Coalition that the Report and Order does not seek to alter existing Commission affiliate transaction and cost allocation rules. BellSouth further concurs that the Commission's affiliate transaction rules do not permit assets that (like most intangibles) do not appear on RBOC books and are not a source of regulated compensation to be included in the "fair market" valuation. In fact, as discussed below, the Commission is without legal authority to unilaterally announce a fundamental change in its accounting rules without opportunity for public notice and comment. Therefore, although BellSouth agrees with the RBOC payphone coalition that the Commission should clarify that its Report and Order was not intended to announce a departure from existing rules, BellSouth believes that the Commission should go further by reconsidering and withdrawing its conclusion regarding going concern value and location contracts.[59]

The Commission announced no legal authority on which to base its "going concern" valuation statement. There is no basis in the 1996 Act, the Commission's existing accounting rules, or precedent to apply a going concern valuation to intangible assets that do not appear on an RBOC's books and are outside the RBOC's rate base. Legally, the Commission has already determined that the value of intangibles cannot be included in asset valuation.[60] There is simply

---

[59] Id. at para 164.

[60] See Order on Reconsideration, Separation of Costs of Regulated Telephone Service from Costs of Non-Regulated Activities, 2 FCC Rcd. 6283, 6315-16, n. 204 ("Joint Cost Reconsideration

no authority to support the Commission's conclusion, which otherwise could be interpreted as creating a new special accounting rule in derogation of precedent and the Administrative Procedures Act.[61]

The issue of how Part 32 of the Commission's rules apply to BOC transfers of payphone assets to either a separate affiliate or an operating division was never addressed in the NPRM.[62] As mentioned above, the Joint Cost Order, as well as the text of the Commission's Part 32 rules, constitutes the prior and existing agency position with respect to such transactions. Because Congress did not require that BOCs transfer their payphone assets to either a separate affiliate or an operating division, because the NPRM is silent as to the issue, and because the Commission had, after the effective date of the 1996 Act and prior to the date it issued its NPRM, already announced a rule of decision in connection with the accounting reclassification of payphone assets that have been treated as detariffed CPE,[63] it cannot be argued that the change announced in the

---

Order"), 2 FCC Rcd at 635, n. 204 (rejecting recommendation that non-regulated entity be charged for employee training, because employee training is "an intangible benefit" and a "sunk" cost); 47 C.F.R. § 65.450(c) (Gains or losses related to the disposition of property that was never included in the rate base shall not be considered for ratemaking purposes).

[61] 5 U.S.C. § 553 (1996) ("APA").

[62] In the NPRM, the Commission described the reclassification of payphone equipment as a "transfer" of assets from regulated to unregulated activities. NPRM at para. 49. The Commission simply stated that its rules provide that such assets will be transferred at undepreciated baseline cost plus an interest charge based on the authorized interstate rate of return to reflect the time value of money. Id. Given the opportunity for public comment, participants in this proceeding noted that the Commission had set forth the wrong legal standard. In its Report and Order, the Commission described the foregoing statement as a tentative conclusion, and, acknowledge certain parties' comments, withdrew further consideration of this, the only approach to asset valuation set forth in the NPRM. Report and Order at ¶ 161.

[63] Declaratory Ruling, Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, 11 FCC Rcd 7362, 7373-74, ¶ 27, (1996). No distinction can be made between the issues raised in that proceeding and those in the Commission's NPRM with respect to asset valuation.

Report and Order constitutes a "logical outgrowth" of the issues raised in the NPRM. In departing from its rules and the Joint Cost Order to announce a new special accounting rule, the Commission has improperly violated the administrative rulemaking process.[64]

IV. THE COMMISSION SHOULD AT A MINIMUM RECONSIDER ITS STATEMENT REGARDING BRANDING. [¶ 244]

BellSouth believes that the Commission correctly concluded, based on a thorough study of the competitiveness of the payphone services market, that there is nothing in the record in this proceeding to indicate that it is not in the public interest for BOC PSPs to negotiate with location providers with respect to selecting and contracting for the interLATA carriers presubscribed to their payphones. BellSouth also agrees with the Commission that "Section 276 . . .significantly alters the regulatory landscape by requiring that LEC provision of payphone service be on par with independent PSP provision of service."[65] Moreover, Congress, in Section 276(b)(1)(D) declared, subject to the Commission's public interest determination, that BOC PSPs should have :

> **The same right** that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones. . .[66]

---

[64] Montgomery Ward v. F.T.C., 691 F.2d 1322, 1329 (9th Cir. 1982) (amendment to rule is proper only when adequate notice is provided to affected parties by agency pursuant to appropriate rulemaking procedures); Harley v. Lyng, 653 F. Supp. 266, 276 (E.D. Pa 1986) (revision of former regulations invalid when not promulgated in accordance with APA procedures for full notice and comment rule-making notwithstanding agency characterization of revision as interpretive); National Retired Teacher's Association v. U.S. Postal Service, 430 F. Supp. 141, 148 (D.D.C. 1977), affirmed 593 F.2d 1360 (D.C. Cir. 1979) (rule that constitutes a chance in prior agency position and has substantial impact on rights and obligations of public is invalid if there has not been compliance with notice and comment requirements of APA even if rule is interpretive).

[65] Report and Order at ¶ 58.

[66] Id. at App. A (emphasis added).

As BellSouth demonstrated in its Comments, Reply Comments, and several ex parte presentations, true market parity means that BOC PSPs can provide the same types of services to the public that independent PSPs provide today. These types of services include providing interstate operator services from payphones to payphone end users only. The Commission rejected BellSouth's argument, on the grounds that it does not interpret Section 276 to grant this authority to BOCs.[67] To interpret the Act in this manner, the Commission interprets Section 271(b)(1)(D) as "envisioning the 'carrier' as being someone other than the BOC to whom negotiating rights are being given."[68] But this interpretation begs, rather than answers, the question. Independent PSP aggregators have the right to negotiate with third party carriers to package and brand toll traffic from their payphones, and the resulting arrangement effectively amounts to the resale of such third party carrier's toll carriage. BellSouth was arguing that "the same right" language in Section 276(b)(1)(D) grants "the same right" to BOC PSPs to negotiate with carriers (BOC or non-BOC) who are qualified to provide interLATA service from BOC payphones.

BellSouth thinks the better interpretation is that Congress meant for the payphone services market to be fully competitive, characterized by competitive equity, with equal opportunities provided to all payphone services providers, regardless of BOC affiliation. At a minimum, the Commission should reconsider its use of the conjunctive/disjunctive "and/or" and clarify its remarks concerning branding. Specifically, the Commission states at paragraph 244:

> While we recognize that independent payphone providers have the ability to engage in the resale and/or branding of presubscribed interLATA service to their

[67] Id. at ¶ 244.

[68] Id.

> payphones, we do not interpret the language of the 1996 Act to grant this authority to BOCs.[69]

The Commission went on to find that, for the purposes of Section 276, resale by a BOC of interLATA service for its in-region presubscribed payphones, which service will ultimately be used by consumers of payphone services, lies outside of the specific rights granted by Section 276(b)(1)(D) of the 1996 Act. It said nothing further about branding, and, in light of the Commission's use of the ambiguous conjunctive/disjunctive "and/or," BellSouth respectfully requests clarification.

Under TOCSIA, where there are multiple operator service providers involved in setting rates for particular operator services, these parties may jointly decide which party will be named in the audible brand.[70] BOC PSPs have long been allowed to provide operator services to interexchange carriers.[71] To the extent BOC PSPs are involved with other operator service providers in setting the rates for particular operator services, including, pursuant to the rights granted under Section 276(b)(1)(D), the rates for interstate operator services, they should be entitled to rely on TOCSIA's multiple OSP branding rules, regardless of the Commission's initial response to BellSouth's request that it be allowed the same right as independent payphone service

---

[69] Id.

[70] Order on Reconsideration, In the Matter of Policies and Rules Concerning Operator Service Providers, 7 FCC Rcd 3882, 3884 ¶ 10 (1992); Report and Order, In the Matter of Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744, 2757 ¶ 29 (1991).

[71] See Letter entitled "Operator Services" from Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Kenneth E. Millard, Senior Vice President & General Counsel, Ameritech Corporation, July 18, 1986; Memorandum Opinion and Order, In the Matter of Bell Atlantic Telephone Companies, Southwestern Bell Telephone Company Petitions for Waiver of Section 69.4(b) of the Commission's Rules, 9 FCC Rcd 7868 (1994); Memorandum Opinion and Order, In the Matter of Bell Atlantic Telephone Companies, Southwestern Bell Telephone Company Petitions for Waiver of Section 69.4(b) of the Commission's Rules, 10 FCC Rcd 3312 (1995).